IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL MCNAIR

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 78871

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Douglas Herndon, District Judge
District Court No. C-17-327395-1

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant presented persuasive arguments in his Opening Brief, establishing that his judgment of conviction was unconstitutional. The State fails to adequately refute his arguments. At certain points, the State fails to address arguments raised by Michael, which warrants reversal. Michael's right to a fair and impartial jury was violated by the State's violation of *Batson v. Kentucky*. The district court erred in its handling of Michael's fair cross section challenge. His right to counsel and due process was violated by comments made during closing argument. His right of confrontation and to have admissible and relevant evidence presented was violated by the district court's decision to admit testimony from an Investigator for the District Attorney's Office. His right to due process was violated by the denial of a voluntary manslaughter instruction. All these errors on their own are sufficient to grant reversal of his conviction but the cumulative error also establishes that his conviction must be vacated and this case remanded for a new trial.

II. REPLY TO THE STATE'S FACTUAL ASSERTIONS

The relevant facts are in the Opening Brief.

III. REPLY TO THE STATE'S ARGUMENT

A. The State Violated *Batson v. Kentucky* and the District Court Committed Structural Error.

Michael argued in front of the district court there was a prima facie case of discrimination based on the mathematical percentages, before and after the final jury composition, citing *Cooper v. State*, 432 P.3d 202, 204-205 (Nev. 2018). The State argues that Michael did not establish a prima facie *Batson* violation – the first step in any *Batson* analysis. AB at 20-21. This argument is irrelevant because, at trial, the prosecutor immediately provided race neutral reasons before district court ruled on the first step. Accordingly, the analysis proceeded to the next step. 5 App. 892-95, 897; OB at 20, *Williams v. State*, 134 Nev. 687, 690, 429 P.3d 301, 306 (2018). As such, the State's argument on the first step is irrelevant.[1] *Id.*; AB at 22. Despite this, the State concludes its argument on this section with an inaccurate claim that "[l]astly, the first step is not moot when the district court moves to the second step 'in an abundance of caution.' *Watson*, 130 Nev. at 779-80, 335 P.2d at 169." AB at 22.

[1] Although the State's argument on the first step is moot, Michael submits that there was sufficient evidence presented at the hearing and in his Opening Brief to establish the first step was met.

However, the State's reliance on *Watson* is misplaced and their argument is contradicted by relevant legal authority. *Williams*, 134 Nev. at 690, 429 P.3d at 306-307. ("Where, as here, the State provides a race-neutral reason for excluding a veniremember before a determination at step one, the step-one analysis becomes moot and we move to step two.") (internal citations and quotations omitted).

Here, it was not the district court that moved to step 2 out of "an abundance of caution"; instead, the prosecution offered race neutral reasons before the district court made a ruling on step one which, contrary to the State's claims, renders the first step moot. AB at 22. *Williams*, 134 Nev. at 690, 429 P.3d at 306-307.

Regarding the second step, the State neglects to address Michael's argument that the error was structural because the district court *failed* to allow Michael to traverse the State's seemingly "race neutral" reasons. *See Williams*, 134 Nev. at 690, 429 P.3d at 306 ("The 'sensitive inquiry' required by step three necessarily includes the district court ***giving*** the defendant the opportunity to challenge the State's proffered race-neutral explanation as pretextual.") (internal citations omitted) (emphasis added).

Here, because the district court committed structural error by skipping the third step, Michael was forced to present his argument as to why the State's race neutral reasons were pretextual in his Opening Brief instead of at the hearing. 5 App. 897; OB at 21-24.

Juror No. 0037 – Ms. Hernandez:

Regarding Ms. Hernandez, the State's race neutral reason that she was shy was pretextual because another juror whom the State did not dismiss also indicated they were shy. 5 App. 892. The State claims that the two jurors are distinct because Juror No. 77 said he would be steadfast in his thoughts and would voice his opinion, while Ms. Hernandez would not be comfortable voicing her opinions. AB at 24. However, Juror No. 77 also said he had a problem with paying attention, that he has a tendency to "kind of fade in and out of just awareness. I have difficulty with that --." 5 App. 878. This was not a problem that Ms. Hernandez had. 3 App. 486-87, 529-31. There were two jurors who identified as being shy with separate problems. *Supra*. This further illustrates the problem caused by the district court's failure to conduct step 3 properly. 5 App. 892. Michael should have been allowed to

challenge these race neutral reasons as pretextual during the hearing. *Supra.*

Juror No. 0050 Ms Lyons:

Regarding Ms. Lyons, the State attempts to reinforce its "race neutral" reason that Ms. Lyons had issues with police officers. The issue, however, was her personal experience of being racially profiled by the Henderson Police Department. AB at 24-25. Other jurisdictions have held this is not a valid race neutral reason to justify dismissal of a juror, as it is based on a racial characteristic. *See People v. Ojeda,* 137M (Colo. App. 2019), *State v. McRae*, 494 N.W.2d 252, 257 (Minn. 1993), *People v. Mallory*, 121 A.D.3d 1566, (N.Y. App. Div. 2014). The State addresses none of these cited cases in their Answering Brief. The cases the State does rely on for support are not analogous to the facts here. Specifically, the State cites to five cases: *Ananaba v. State*, 755 S.E.2d 225, 227 (Ga. App. 2014); *Guzman v. State*, 287 Ga. 759, 762(2), 700 S.E.2d 340 (2010); *People v. Acevedo*, 35 N.Y.S.3d 752, 757 (2016); *People v. Calvin*, 72 Cal. Rptr. 3d 300, 307 (2008); and *People v. Blacksher*, 52 Cal. 4th 769, 802–03 (2011); AB at 25-26.

Ananaba is inapplicable because there, of the three jurors dismissed, only one had an alleged negative experience with law enforcement based on race. *Id.*, 325 Ga. App. at 831-832, 755 S.E.2d at 227. The court ruled that a general belief that law enforcement is racially motivated is valid grounds to dismiss a juror. *Id.* In the instant matter, Ms Lyons said she had been personally racially profiled, not that she generally believed police were motivated by race. 3 App. 513. Likewise, the State's reliance on *Guzman* is misplaced because there, besides having a personal "negative experience" with law enforcement, the juror expressed a belief there was something wrong with the criminal justice system itself. *Guzman*, 287 Ga. At 762, 700 S.E.2d at 343.

In *People v. Calvin*, the issue was African American jurors having a general skepticism about the criminal justice system and law enforcement. *Id.*, 72 Cal. Rptr. 3d at 307. The jurors there, who described racial profiling, also believed that poor defendants were at a disadvantage and expressed doubts about the credibility of people who worked in the music industry – both the defendant and the victim were musicians. *Id.*

In *People v. Blacksher*, the racial profiling was not experienced by the juror themselves but by their relatives. *Id.*, 52 Cal. 4th at 802–03. Furthermore, that was a capital case where the same juror also expressed ambivalent attitudes toward the death penalty. *Id.*

Last, although in *People v. Acevedo*, 35 N.Y.S.3d 752, 757 (2016) the court found that being a victim of racial profiling was a "race-neutral" reason, this position is counter-intuitive. A person who is targeted by police because of the color of their skin is racially profiled. The resulting mistrust of police is based on race and not a race neutral reason to exclude a person from a jury. The State's actions here amount to informing Ms. Lyons that her rightful resentment for being racially profiled disqualifies her from serving as a juror. This "perpetuates the race-based stereotypes *Batson* eschewed." *People v. Ojeda,* 137M (Colo. App. 2019).

Here, Ms. Lyons did not use the term "negative experience" but focused on being racially profiled. 3 App. 513. Furthermore, she did not say that the criminal justice system as a whole was flawed. 3 App. 511-515. And while she indicated a willingness to try and treat police officers fairly, any concerns she expressed were alleviated when she was

informed that no officers from Henderson would be testifying. 3 App. 514. Furthermore, the State challenged her for cause but the district court ***denied*** their challenge. 3 App. 578-80; 4 App. 757-759; 5 App. 892. Specifically, the district court noted that Ms. Lyons was similar to jurors on the other end of the spectrum with a favorable view of law enforcement but can listen to what they have to say objectively. 4 App. 759. Despite the State's strong efforts to remove her, the district court did not feel there was grounds to remove her because of her views on law enforcement. 4 App. 759-60. Accordingly, Michael's conviction should be reversed.

Juror No. 0068, Ms. Pool:

Finally, regarding Ms. Pool, the State claims that Michael's reliance on *Conner v. State*, 130 Nev. 457, 466, 327 P.3d 503, 510 (2014) is misplaced. AB at 26. However, when providing its race neutral reason, the State claimed that "…it seemed to me by her comments in [*sic*] that she believes in rehabilitation and that there aren't situations where, you know, we should put people away indefinitely." 5 App. 894. However, this is belied by the record as Ms. Pool never referenced indefinite sentences. 3 App. 444-45; 4 App. 770-798 800-10; 854-57. Accordingly, *Conner*

applies. *Id.*, 130 Nev. at 466, 327 P.3d at 510. ("A race-neutral explanation that is belied by the record is evidence of purposeful discrimination.")

Ms. Pool stated that while her brother had been incarcerated, her sister in Philadelphia is a judge. 3 App. 444. Additionally, her brother's incarceration was due to narcotics, not violent crimes. 4 App. 770-72. Of key import, the State fails to acknowledge that she said she could have an open mind in deliberations, and that she respected law enforcement and generally had good encounters with them. 4 App. 774. She also said she could reach a verdict without factoring the potential consequences regarding sentencing. 4 App 809-10. Nowhere does the record support the claim she would not favor long or indefinite sentences. 3 App. 444-45; 4 App. 770-798, 800-10, 854-57.

Here, the district court failed to allow Michael to traverse the "race-neutral" reasons the State offered. This is structural error. *See Williams*, 134 Nev. at 690, 429 P.3d at 306.

Because Michael established the dismissal of three jurors violated *Batson v. Kentucky* and because the district court committed structural

error by not allowing Michael to traverse the State's reasons for challenge at the crucial third step, the only remedy is reversal of his conviction.

B. The District Court Erred by Not Striking the Venire Panel After Michael Made Specific Allegations That Established Systematic Non-Compliance With NRS 6.045.

Michael's state and federal constitutional rights to Due Process, Equal Protection, a Fair Trial, a Fair and Impartial Jury, and Right to a Jury Representing a Fair-Cross Section of the Community were violated by the district court's denial of a motion to strike the venire panel. The district court erred because it failed to grant an evidentiary hearing where the panel did not represent a fair cross section of the community and Michael established systematic exclusion.

The State's reliance on NRS 6.110 and *Battle v. State*, Unpublished, Lexis No. 607, 385 P.3d 32, 132 Nev. 945 (Nev. 2016) is misplaced because neither relate to Michael's arguments. Neither the district court nor Michael relied on NRS 6.110 or *Battle* for argument.[2] The relevant statute is NRS 6.045(3), as this statute instructs what sources the jury

[2] Michael made one reference to *Battle*, pointing out that the footnote in *Battle* regarding no specific number of sources was required was overridden by the statutory change in NRS 6.045(3). 3 App. 401. *Battle v. State*, Unpublished, Lexis No. 607, 385 P.3d 32, 132 Nev. 945 (Nev. 2016).

commissioner must pull jurors from. At the fair cross section hearing, the district court acknowledged that in its view, the statute was not being complied with. 3 App. 400. Specifically, the court noted:

> So, I think the only thing that's changed recently is, as of last year, the voting rolls -- they were having problems with the voting rolls, but that's been remedied since then so really now it's just the Department of Employment division…

Id. As Michael noted, it had been over two years since the legislature amended NRS 6.045 to require four sources. *Id*. The State does not dispute Michael met the first and second prongs of the test outlined in *Morgan v. State*, 134 Nev. 200, 208, 416 P.3d 212, 221 (2018) and *Duren v. Missouri*, 439 U.S. 357, 369 (1979); 3 App. 401; AB at 31; 11 App. 2011, 2041.

Michael contended this case is similar to *Valentine v. State,* 454 P.3d 709, 714 (Nev. 2019) because he made specific allegations that could establish systematic exclusion, and that the district court relied on testimony from a prior hearing. The State fails to address how *Valentine* differs, other than making the same point Michael made, which was that unlike *Valentine*, the allegations of failure to comply with NRS 6.045 were true. *Id*., 454 P.3d at 714-715; 3 App. 394-400.

Recently, this Court addressed an evidentiary hearing request in *Ortiz v. State*, 2021 Nev. Unpub. Lexis. No. 204 (Nev. 2021), a decision released after Michael's Opening Brief and the State's Answer were filed. The Court's ruling in *Ortiz* seems to conflict with the legal rulings of *Valentine* and a subsequent decision in *Sims v. State*, Unpublished, Lexis No. 1024, 474 P.3d 835 (Nev. 2020). As such, Michael respectfully requests that the Court reconsider its ruling in *Ortiz*, in the context of this case. The *Valentine* rule is that "[a]n evidentiary hearing [is] warranted on a fair-cross-section challenge when a defendant made specific allegations that, if true, would establish a prima facie violation of the fair-cross-section requirement." This rule was subsequently applied in *Sims v. State*, Unpublished., Lexis No. 1024, 474 P.3d 835 (Nev. 2020), where this Court reversed after finding error where the first two prongs were met, and specific allegations were made that if true would establish systematic exclusion. *Id.* Furthermore, the Court noted that just as in *Valentine*, the district court relied on testimony from a prior hearing. *Id.*, 454 P.3d at 714-715; *Sims v. State*, Unpublished., Lexis No. 1024, 474 P.3d 835 (Nev. 2020).

Like *Sims*, the district court in *Ortiz* relied on testimony from a prior hearing to address the issue. *Id*.; *Ortiz v. State*, Unpublished, Lexis No. 204 (Nev. 2021). However, unlike *Sims* and *Valentine*, in *Ortiz* the Court declined to find that an evidentiary hearing was warranted. *Id*. In *Ortiz*, this Court departed from the standard articulated in *Valentine* by omitting the legal principle regarding "specific allegations, which if true, would warrant an evidentiary hearing." Instead, this Court held that "[a]n evidentiary hearing is unwarranted unless the defendant can demonstrate a prima facie violation of the right to a fair cross-section of the community in a jury pool." *Ortiz v. State*, Unpublished Lexis No. 204 (Nev. 2021) (citing *Valentine*, 454 P.3d at 714). *Compare that language with Valentine,* where this Court stated "An evidentiary hearing was warranted on a fair-cross-section challenge when a defendant made specific allegations that, if true, would establish a prima facie violation of the fair-cross-section requirement."

The Court denied that Ortiz was entitled to an evidentiary hearing because he did not:

> [D]emonstrate that African Americans were systematically excluded as it was unclear if the jury commissioner was now receiving jury information from the Employment Security Division of the Department of Employment, Training and Rehabilitation, in

> addition to other sources, or that even if the jury commissioner was not yet receiving that information, that African Americans were more likely to qualify for unemployment benefits and would be reported in higher numbers from that Department.

Ortiz v. State, Unpublished, Lexis No. 204 (Nev. 2021).

It is logical to conclude from the Court's ruling that if these things had been shown, Ortiz would have established systematic exclusion. *Id.* Abiding by the principle articulated in *Valentine*, Ortiz made "specific allegations that, if true, would establish a prima facie violation of the fair-cross-section requirement." *Id.*, 454 P.3d at 714. As it stands, *Ortiz*, a persuasive decision, conflicts with a published decision from *Valentine* because it applies the standard for demonstrating a prima facie violation to obtaining an evidentiary hearing. *See Valentine and Sims, supra.*

Michael respectfully requests this Court reexamine its decision in *Ortiz* and apply the standard articulated in *Valentine.* Under that standard, he was entitled to an evidentiary hearing.

Finally, the State inaccurately claims that "[t]he Jury Commissioner was complying with the statute to the best of her ability, and the fact that an entity is not providing a list does not mean the Jury Commissioner is at fault." AB at 33. However, this is not supported by

the *Arenas* transcript. *Id*. To the contrary, regarding NRS 6.045(3), the jury commissioner testified:

> A Okay. Well, as of right now we don't have that list. Efforts have been made to get that list from the Department of Employment, Training and Rehabilitation.
>
> Q Okay.
>
> A I couldn't address specifically what those concerns are. You would have to speak to our IT Director about that, but there have been some concerns about getting the list, and that's not just us; it's Nevada-wide.

11 App. 2025.[3] That the jury commissioner could not specifically address what the concerns were in obtaining the statutorily-required list fails to support the State's uncited assertion that the commissioner's office was doing everything to the best of their ability to obtain it. AB at 33. Further, whether or not it is the fault of the jury commissioner is irrelevant.[4] The end result is there were two government entities failing to comply with a valid statute. *Id*.

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[3] Michael has moved to supplement the Appendix to include the transcript from *Arenas*. This was submitted to the court as an exhibit and based on certain claims in the State's Answering Brief, appellant believes it is necessary to supplement the record.

[4] Michael noted that although the jury commissioner is diligent and helpful, even if the failure to comply is not intentional, it still violates the statute. 3 App. 396. As noted below, the district court agreed with Michel's position on negligent non-compliance as opposed to intentional.

The State ignores that both the jury commissioner's office and the DETR are government entities, and as such, arguably the "State." *See Duren*, 439 U.S. at 358 (1979) ("Once a defendant makes a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross-section of the community, the state bears the burden of justifying this infringement by showing attainment of a fair cross-section to be incompatible with a significant state interest."). Ultimately, as the district court noted, intent is not a prerequisite for systematic exclusion. 3 App. 403.

Whether intentionally or negligently, two governmental entities were not complying with statutory requirements. *Supra*. The only way for the court or the State to confirm why the list was not being obtained specifically would have been to hold an evidentiary hearing. If the court felt that there was non-compliance, as it stated, such that an evidentiary hearing was not needed, it should have granted Michael's reasonable alternate request for relief. 3 App. 401-403.

The State infers that Michael's alternative requested relief of bringing in a new panel was impractical. AB at 33-34. However, non-compliance with a statutory obligation was not Michael's fault and he

should not be punished for it. Accordingly, he requested a new venire that did not meet the second prong of the *Duren*/*Morgan* analysis mathematically. *Morgan*, 134 Nev. at 208; 416 P.3d at 222; 3 App. 402-403. The State addresses this argument not by citing any authority but restating the district court's finding that Michael's requested relief could not be granted because it would "halt the criminal justice system," and "not give people their trials until the Department of Employment can start providing their information." 3 App. 403; AB at 29. To the contrary, if the second jury represented a fair cross-section mathematically, no further challenge could be made. *Morgan*, 134 Nev. at 208; 416 P.3d at 222; 3 App. 401-403.

Just as in *Valentine* and *Sims*, Michael met the first two prongs of the fair cross section. Just as in *Valentine* and *Sims*, Michael made specific allegations which if true would establish systematic exclusion. *See Valentine and Sims, supra.* However, beyond *Valentine*, the allegations were true here. Unlike *Valentine*, Michael presented the district court with an alternate remedy, to bring in a new panel. 3 App. 401-403. The district court erred by not doing so and the State fails to refute these claims. The only remedy here is reversal.

C. There is Insufficient Evidence to Support the Murder Conviction.

Michael's State and federal constitutional rights to Due Process, Equal Protection, and right to be convicted only upon evidence establishing every element of the offenses beyond a reasonable doubt, were violated because there was insufficient evidence to support the conviction for murder in the first degree with use of a deadly weapon.

The State fails to refute this argument by failing to address Michael's argument regarding premeditation and specific intent. First degree murder, under the theory of premeditation, requires that the jury find beyond a reasonable doubt that the defendant committed a willful and deliberate killing. *Byford v. State*, 116 Nev. 215, 236, 994 P.2d 700, 713-714 (2000) and *Valdez v. State*, 124 Nev. 1172, 1196, 196 P.3d 465, 481 (2008).

The State fails to address Michael's specific argument that under *Byford* and *Valdez*, there was insufficient evidence presented to establish premeditation, willfulness, and deliberation. OB at 31. Although it cites the correct authority on this issue, it fails to apply it to the facts. AB at 37-38. Instead, the State argues evidence establishing motive and opportunity to commit murder when Michael has alleged insufficient

evidence to establish a willful, premeditated and deliberate killing. Motive is relevant as an aggravator in a death penalty case and does not apply here. NRS 200.033(9). Motive is not an element of the crime charged. 9 App. 1861. Michael never argued impossibility as a defense so opportunity is irrelevant.

Evidence of whether the shooter was Michael or Mitchell was contradictory. *See e.g.* 1 App. 102-03; 6 App. 1110; 7 App. 1421-22, 1438. As Michael noted, at trial, the State relied heavily on Mitchell's testimony, whose story changed multiple times and who was under the influence of marijuana when he testified. 7 App. 1431; *supra.* The State concedes that Kenneth testified that Mitchell, not Michael, was the shooter, but adds that Kenneth was regularly intoxicated. AB at 40. However, there was no evidence provided that Kenneth was intoxicated when he saw Mitchell shoot Gordon or when he testified at the Preliminary Hearing (unlike Mitchell who was high when he testified at trial). 1 App. 93; *supra.*

Other testimony the State relies upon fails to establish a willful, deliberate and premeditated killing took place. The evidence adduced indicated that Michael "blew off steam" by completing donuts in the

parking lot, which indicates that Michael had "cooled down" by the time the shooting took place. 5 App. 1017; 8 App. 1560. Prior negative reactions with the homeless in the area were too remote in time to establish willfulness, deliberateness or premeditation. 5 App. 1004; 6 App. 1102.

Further, Michael called Romero up front to help him handle things outside. 5 App. 1320. Michael was telling the homeless to leave them alone. 5 App. 1322. Romero had the intent to fight but Michael just wanted to watch. 5 App. 1331. Michael changed his shirt twice, from a blue shirt to a red shirt and back to a blue shirt 8 App. 1569-71; 9 App. 1737, because he worked in different businesses within the building and this was not unusual. 6 App. 1142-1170.

The firearm was being sold by Michael to Romero. 6 App. 1335. Michell, the shooter, is Michael's brother and, as a result, has a connection to the weapon as well. Evidence also established that another person's DNA was found on the weapon and that Mitchell could not be excluded as a contributor. 8 App. 1516, 1517, 1524.

Even with Mitchell's highly suspect testimony, the State failed to establish that Michael acted with the necessary elements of

premeditation, willfulness, and deliberation. Without it, there is as much evidence, based on Kenneth's testimony, that Michael was not even the shooter. *Supra*. The conviction here does not fit with this Court's goal to depart from the trend to "muddy the lines" between first and second degree murder. *Byford*, 116 Nev. at 236, 994 P.2d at 713-714.

Because the State failed to refute Michael's argument that there was insufficient evidence to establish first degree murder, the only remedy is reversal of his judgment of conviction.

D. Michael Was Prejudiced By The State's Comments During Closing Argument Referencing Defense Counsel and Making an Improper Analogy of a Traffic Light to Explain Premeditation.

Michael contended that his state and federal constitutional rights to Due Process of law, Equal Protection, a Fair Trial, and Confrontation were violated when the State made an analogy in closing disparaging defense counsel. He contended that he was further prejudiced by the State making an analogy to running a traffic light to explain premeditation.

/ / /

1. The State improperly referenced defense counsel during closing argument.

The district court noted it did not believe the State's intent was to disparage, because defense counsel objected several times before the analogy, the jury could infer it was addressing legitimate defense tactics. 9 App. 1781-82, 1787. However, it is not the Court's belief that is at issue, it is the effect of such remarks on the jury. *State v. Rodriguez*, 31 Nev. 342, 102 P. 863 (1909).

Regarding the standard of review, the State argues this error is not of constitutional dimension but fails to cite a single case to support this position. AB at 45. Michael cited to *Browning v. State*, 124 Nev. 517, 534, 188 P.3d 60, 72 (2008), where this Court applied harmless error analysis to disparaging comments towards defense counsel. The State fails to acknowledge this Court's ruling in *Browning*. AB at 45. Beyond this, the State's argument fails because the right to effective assistance of counsel is a fundamental constitutional protection. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Because of its unsupported claim that the error here is not of a constitutional dimension, the State's argument that "it is highly unlikely that these remarks substantially affected the verdict, given the substantial evidence introduced at trial to prove Appellant's

guilt" must fail. AB at 45. Because the State fails to address the claim articulated in *Chapman v. California*, 386 U.S. 18, 24 (1967), it waives its argument. *See Polk v. State*, 126 Nev. 180, 184-86, 233 P.3d 357, 359-61 (2010); *See also Belcher*, 464 P. 3d 1013, 1023-24 (Nev. 2020).

However, assuming *arguendo* this Court finds the error is non-constitutional, the State's argument remains unpersuasive. Specifically, the State claims there is substantial evidence to support the conviction AB at 45. However, as discussed above, there was insufficient evidence to support a conviction for first degree murder. The State fails to acknowledge the contradiction to their theory of the case raised by Kenneth's testimony, which identified Mitchell as the shooter, but instead cursorily references credibility, clearly referencing Mitchell's lack thereof. *Supra*; AB at 45. As discussed above, there was not sufficient, let alone substantial, evidence to support a conviction for first degree murder and the analogy addressing a supposed motive affected the jury's verdict. The State fails to refute this argument.

Finally, the district court abused its discretion in denying a mistrial. The State cursorily references the district court's findings, specifically that the court felt it was a bad analogy but an admonishment

was sufficient. 9 App. 1809-10; AB at 46. However, the State fails to acknowledge Michael's arguments on this issue and the district court's express finding it would not be "surprised one iota if you get your trial reversed because of this…" 7 App. 1810. As such, the State fails to refute why it was not an abuse of discretion to deny the mistrial. If the court acknowledged the misconduct and realized a reversal was possible, failure to consider the effect of the disparaging comments on the jury merits reversal.

2. The State made an improper analogy involving a traffic light to explain premeditation.

The State claims that appellant failed to properly preserve the objection. AB at 46. However, Michael objected to the analogy itself. 9 App. 1800. Furthermore, the State the case relies on is inapplicable because the only portion of the case related to a waiver of the issue is not relevant. Specifically, in *Guy v. State*, 108 Nev. 770, 783, 839 P.2d 578, 586 (1992), the Court held that appellant waived their argument because "when the trial court specifically asked appellant if he had any objections to either the penalty phase jury instructions or the special verdict forms, he responded negatively..." *Id*. The Court also rejected an argument regarding prosecutorial misconduct, not just because appellant failed to

object, but because the claims on appeal did not match comments this Court condemned in another case. *Guy*, 108 Nev. at 780, 839 P.2d at 585. That is not relevant to the facts here. 9 App. 1800.

The State's subsequent arguments to address the analogy fail. Michael never disputed that in Nevada, premeditation may be arrived at in a short period of time, but instead that the analogy was improper and undermined the burden of proof for the State. OB at 46, Michael noted that while premeditation may be argued as being instantaneous as successive thoughts of the mind, deliberation requires much more and the State's analogy obviated this distinction because it presumably addressed *all* the elements of premeditation through a yellow traffic light. OB at 45. This runs contrary to this Court's *Byford*'s mandate that the prosecution prove the killing was not the result of a mere unconsidered and rash impulse, but rather that it resulted from a cold, calculated judgment and decision. 9 App. 1800; *Id.*, 116 Nev. at 236-37, 994 P.2d at 714-15; OB at 45-46. The State fails to address this crucial argument. AB at 47. *See Polk*, 126 Nev. at 184-86, 233 P.3d at 359-61; *See also Belcher*, 464 P.3d at 1023-1024.

Despite the State's assertion otherwise, Michael's reliance on *McCullough v. State*, 99 Nev. 72, 73-74, 657 P.2d 1157, 1157-58 (1983) is not misplaced. AB at 47. In *McCullough*, the issue was not whether the trial court or the prosecution conveyed an incorrect legal statement – the 'who' was not in question. *Id*. Instead, as the Court noted, "an attempt by the trial court to clarify the meaning of reasonable doubt is not by itself reversible error," but the "question on appeal is whether the court's statements correctly conveyed the concept of reasonable doubt to the jury." *McCullough*, 99 Nev. at 75, 657 P.2d at 1158. That is the key argument here, whether the statements correctly conveyed the law to the jury. Here, the State's improper analogy did not correctly convey the law but instead misconstrued the law. OB at 45-46.

This was not harmless error. Here, there was insufficient evidence that Michael intentionally, willfully, and deliberately shot Gordon because there was conflicting testimony as to who shot Gordon. *Supra.* The State's analogy confused the jury on the key elements necessary for a finding of first degree murder under this Court's mandate in *Byford,* 116 Nev. at 236, 994 P.2d at 713-714. As a result, Michael's conviction and sentence must be reversed.

E. The District Court Abused its Discretion by Allowing an Investigator Employed by the Clark County District Attorney's Office to Testify and Attack the Credibility and Character of Witnesses.

Michael's state and federal constitutional rights to Due Process of Law, Equal Protection, and Confrontation were violated by the district court's decision to admit inadmissible and irrelevant testimony by an employee of the Clark County District Attorney's Office.

1. The district court abused its discretion by allowing an investigator for the prosecution to testify and improperly attack the credibility of witnesses.

The State cites to NRS 50.085, AB at 49, but State fails to explain how the investigator's testimony is an exception. The gist of the testimony was that sometimes, Kenneth was inebriated and the State's investigator could not locate him after his hearing. AB at 50. This does not make his testimony relevant. As the record indicates and the State's silence on the matter makes abundant, its investigator *never* claimed to know that Kenneth was inebriated when he testified or when he observed the shooting. *Id*. Therefore, the *sole* purpose of the investigator's testimony was to improperly infer that Kenneth was an alcoholic and his testimony was not credible. The State fails to address this point and relies on a claim that his testimony was necessary to explain to the jury

why he could not be located. *Id*. This is belied by the record. If the testimony was limited to the fact that the investigator could not locate Kenneth, that would explain his absence. 8 App. 1530. To add that he was inebriated sometimes, would only taint his testimony to the jury. *Id*. The State fails to address this crucial point.

As Michael noted, the appropriate standard is plain error. However, the State's attempts to argue that the errors did not substantially affect the verdict fail. Specifically, regarding Kenneth, the State claims there was no prejudice because his testimony read into the record indicated that he was not inebriated when he testified. AB at 50. That was not Michael's argument. What the State failed to address is that by saying he was generally an alcoholic, the jury would conclude that his testimony was untrustworthy. OB at 54. Not only does the State fail to address this argument but it fails to cite a single case to support its position that if extrinsic evidence is improperly admitted to attack the credibility of a witness, it is harmless. AB at 50-51. The prejudice was severe as Kenneth testified Mitchell did the shooting. 1 App. 100, 103. Michael established that the district court abused its discretion in admitting this testimony,

that it substantially affected the verdict, and the State fails to refute this point. As such, the only remedy is reversal.

2. The testimony regarding Mitchell was not properly noticed to defense counsel and was inadmissible hearsay and not proper impeachment.

The State entirely fails to address Michael's argument that inconsistent statements from Mitchell should have been noticed to defense counsel. Instead, it argues that because the statements were not recorded or written statements, the statute does not apply. AB at 52. Furthermore, the State fails to address *Kendrick v. State*, Unpub., Lexis No. 546, 462 P.3d 1233 (Nev. 2020) in the context that Michael raised it.

In *Kendrick*, this Court addressed NRS 174.235, which requires the State to provide evidence it intends to use in its "case in chief." *Kendrick*, Unpub., Lexis No. 546, 462 P.3d 1233. Similarly, here, the "spirit" of NRS 174.235 addresses witness statements the prosecution intends to introduce. Just like *Kendrick*, the State violated that spirit here by failing to notice defense counsel of testimony regarding statements Mitchell made. 8 App. 1530-34.

The State attempts to distinguish *Kendrick* because that involved a jailhouse call. AB at 52. *See* NRS 174.235(1)(a). *Kendrick v. State*, 2020

Unpublished, Lexis No. 546, 462 P.3d 1233 (Nev. 2020) (distinguishing between a defendant's written or recorded statements and those made by witnesses the State intends to call during its case in chief). Although the statements here were not recorded, the principle applies. As defense counsel noted, since the State's investigator met with Mitchell before trial, he should have prepared a report. By not doing so, the State created a loophole to get around properly noticing defense counsel. 8 App. 1532.

Michael contended the statements were inadmissible hearsay. Specifically, the investigator's testimony that Mitchell told him he saw Michael with a gun when he turned around was not "impeachment testimony." 7 App. 1412-15. The State fails to address Michael's point that when the prosecution attempted to introduce this statement through Mitchell, the district court prevented them from doing so because it was not a prior inconsistent statement. 7 App. 1413-15.

Instead, the State claims that "[p]rior to this testimony, Mitchell had testified that when he turned around, he did not see Gordon fall to the ground. Accordingly, the testimony by Investigator Honaker was permissible as there was an inconsistent statement." AB at 52. The State further claims that "the jury heard Mitchell's testimony that he did not

see the victim fall to the ground and **he did not see his brother with a firearm in his hand**." AB at 53 (emphasis added). However, the citation the State provides does not support this statement. Mitchell did not testify he did not see Michael with a firearm in his hand. 7 App. 1408. Instead, he was asked if he saw who had shot when he turned around and he said no. *Id*. It is evident that the State needed their investigator's testimony to rehabilitate a witness who was clearly not credible, high on marijuana when he testified, and whose story changed multiple times. *Supra*. The State's investigator brought in a statement that *added* to Mitchell's testimony, where it was inadmissible.

Finally, the State again claims there was no prejudice because of overwhelming evidence. AB at 53. As discussed above, the State did not provide sufficient evidence for first degree murder that was premeditated, willful, and deliberate. Furthermore, the State fails to respond to Michael's argument that this admission was especially prejudicial because of Mitchell's credibility issues and his importance to the prosecution's case. As such, the only remedy is reversal.

/ / /

F. The District Court Abused Its Discretion by Failing to Grant the Requested Voluntary Manslaughter Instruction.

Michael's state and federal constitutional rights to due process of law, equal protection, and a fair trial were violated by the district court's refusal to instruct the jury on voluntary manslaughter, thereby preventing Michael from presenting his theory of the case.

The State claims that Michael was not entitled to a verdict of voluntary manslaughter because his defense alleged that he was not the shooter. AB at 55. The State's argument mirrors the district court's erroneous ruling. 8 App. 1636. The proper standard is simply whether there is any evidence, "no matter how weak or incredible," to support the requested instruction. *Crawford v. State*, 121 Nev. 746, 754, 121 P.3d 582, 589 (2005). The State fails to cite to any legal authority to support its proposition that a defendant is not entitled to an accurate instruction of the law because they may have presented a different theory at trial. AB at 55-57. Further, Michael cited to persuasive authority which supports that a defendant is entitled to an instruction, even if their theory at trial contradicts it. OB at 61. The State fails to address these cases or provide any legal authority to counter Michael's position. As

such, they waived their argument on this issue. *See Polk*, 126 Nev. at 184-86, 233 P.3d at 359-61; *Belcher*, 464 P.3d 1013, 1023-1024.

The State then attempts to argue that *Newson v. State,* 462 P.3d 246 (Nev. 2020) is distinguishable because here, the evidence leading up to the shooting indicates premeditation. AB at 56. Specifically, it claims that "[s]ome accounts state that there was a fight between Gordon and Mitchell, but Appellant, who was standing in the street, was the one who fired eight rounds into Gordon, resulting in his death." AB at 56. However, there was conflicting testimony regarding the altercation between Mitchell and Gordon. 7 App. 1407. Other witnesses either saw Mitchell do the shooting or testified that Gordon was lying or sitting down when Mitchell approached and started attacking him. *See e.g.* 1 App. 103; 6 App. 1100. However, notwithstanding this, Mitchell's testimony *was* evidence. *See Harrison v. State*, 96 Nev. 347, 351, 608 P.2d 1107, 1110 (1980) (Court noted that "[t]he testimony of the victim describing the gun carried by [the defendant] during the robbery was sufficient to support the conviction."). In fact, it was key evidence that the State relied upon to argue Michael was the shooter. 9 App. 1780. While it was certainly suspect testimony that in many parts was

uncorroborated and contradicted, the State relied on it heavily during closing argument. *Id.*

The State cannot accept one part of Mitchell's testimony when it suits them and disregard the other part when it does not. The jury was allowed to consider Mitchell's highly suspect testimony to determine Michael was guilty of murder but the district court refused to allow the jury to consider Mitchell's testimony for a voluntary manslaughter instruction. *See Newson*, 462 P.3d at 246 ("[t]he State was not prohibited from arguing circumstantial evidence as a whole showed first-degree murder. Yet, Newson's counsel was prohibited from arguing Newson's theory regarding what crime the evidence showed.").

Mitchell's testimony supported the contention that Gordon came towards him, which could have caused the necessary provocation for voluntary manslaughter. 7 App. 1407; 8 App. 1636. The State fails to refute that the evidence presented before the jury, "no matter how weak or incredible," could have provided the necessary provocation in the moment for voluntary manslaughter. *Crawford*, 121 at 746, 121 P.3d at 585.

This was not harmless error. The State fails to cite to a single case in Nevada that denies the accused jury instructions they are legally entitled to simply because it conflicts with their theory of the case. AB at 53-57. As such, the State's focus on Michael's theory that he was not the shooter certainly does not establish that the error was harmless.[5] Therefore, the State has failed to refute Michael's claim that the district court abused its discretion in denying the voluntary manslaughter instruction, that he was prejudiced by the denial, and the only sufficient remedy is reversal of his judgment and conviction.

G. Cumulative Error Warrants a New Trial.

Michael's state and federal constitutional rights to due process, equal protection, and a fair trial were violated because of cumulative error. Michael submits that the legal analysis and authority addressing

[5] The State makes a final point that during closing arguments, defense counsel argued that Mitchell was the one who shot Gordon, and there was no evidence that Appellant even agreed to Mitchell striking Gordon. AB at 57. This is not relevant to Michael's argument that the jury could have found that Gordon coming towards Mitchell, combined with their prior arguments, was sufficient to grant a voluntary manslaughter instruction. Furthermore, the State cites to no relevant case to support this position.

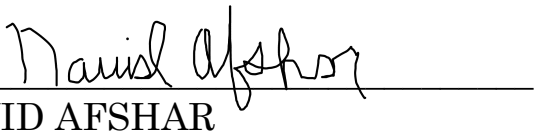
this issue in his Opening Brief are sufficiently pleaded and no reply is needed to the State's Answering Brief on this issue.

III. CONCLUSION

Based upon the foregoing, Michael requests that this Court vacate his convictions and remand for a new trial.

DATED this 7th day of April , 2021.

Respectfully submitted,

By: 
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CERTIFICATE OF COMPLIANCE

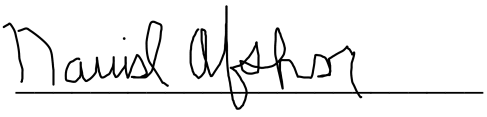
1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).

2. I hereby certify that this brief does comply with the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font of the Century Schoolbook style.

3. I hereby certify that this brief does comply with the word limitation requirement of NRAP 32(a)(7)(A)(ii). The relevant portions of the brief are 6989.

4. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of April, 2021.



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 7th day of April, 2021, a copy of the foregoing Reply Brief and Supplemental Appendix Vol 11 was served as follows:

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